IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RONALD MELVIN MENDES, a/k/a RONALD JOSEPH MENDES, Appellant.	)	No. 64912-4-I DIVISION ONE UNPUBLISHED OPINION FILED: July 19, 2010

Appelwick, J. — Mendes appeals his convictions for second degree murder, second degree felony murder, and unlawful possession of a firearm. During a late night visit to victim Saylor's home, Mendes shot and killed Saylor when Saylor threatened him with a baseball bat. Instructing the jury on first aggressor was proper. Failure to give the self-defense instruction, 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 17.02, at 253 (3d ed. 2008) (WPIC), to the assault predicate to felony murder was error. Failure to request the revived self-defense instruction constituted ineffective assistance of counsel. We do not reach Mendes's arguments that the State presented insufficient evidence to disprove self-defense beyond a reasonable doubt and that that failure to vacate his second conviction for murder in the second degree puts him in double jeopardy. We reverse and remand for further proceedings consistent with this opinion.

FACTS

Ronald Mendes met Lori Palomo in October 2007 while they were both staying at the home of an acquaintance. At the time, Palomo was on a break from her boyfriend of seven years, Danny Saylor. Mendes, Palomo, and Saylor all used illegal substances regularly, including marijuana and methamphetamine. Mendes and Palomo spent three weeks together, progressing to an intimate relationship, before Palomo returned to Saylor.

Approximately one month later, Mendes started stopping by Saylor's house, trying to see Palomo. He stopped by three to four times. He met Saylor, who told him Palomo did not want to see him anymore. In late December, Saylor and Palomo demanded that Mendes not visit Saylor's house anymore. But, during this time, Palomo and Mendes continued seeing each other.

On January 26, 2008, Mendes, a convicted felon, acquired a gun from James Cardey, ostensibly to use for an unrelated purpose. The next day, Mendes went to Saylor's house. He testified that he needed Palomo's help retrieving a laptop she had pawned for him. At the time, Michael Paux, Charles Bollinger, and McKay Brown were staying at Saylor's home temporarily. Brown came out of the house and met Mendes when he pulled into the driveway. He told Mendes that Palomo and Saylor were still sleeping. Mendes told him he would return later.

That night, when Palomo and Saylor were getting ready to sleep in a back bedroom, Saylor asked Bollinger to wake him up if Mendes arrived. Bollinger and Brown then went to sleep on couches in the living room, and Paux went to sleep in an attic bedroom. Bollinger woke to Mendes tapping on the door at

around 11:30 p.m. Mendes did not appear angry or threatening. Bollinger told Mendes that Saylor was angry at Mendes for spray painting Palomo's car with profanity. Mendes asked Bollinger to get Saylor so he could explain about the car. Saylor was in the bedroom in bed with Palomo. So, Bollinger went to the bedroom to tell Saylor that Mendes was there. Saylor, saying he was going to "kick [Mendes's] ass," put on his work boots and angrily went into the living room.

Saylor's house was extremely small. Mendes stood near to and facing the front door talking to Brown when Saylor approached him from the back of the house. Mendes testified that Saylor kicked him from behind without warning. According to Brown, Saylor punched Mendes several times. Mendes also threw punches, but failed to make contact. Mendes was knocked onto the coffee table. Mendes testified the fall exacerbated a preexisting injury to his hip, fracturing it. Mendes sat up and pulled a gun from the inside pocket of his jacket. Mendes testified that he said, "Back off" and "Quit hurting me, man." He then told Saylor, "I don't want to shoot no one. I want to leave." But, he admitted on cross-examination that he might have said, "I'm going to smoke you, motherfucker."

Saylor ducked out of the room, returning to the bedroom. Bollinger crossed the living room to get Mendes and tried to push Mendes back to the door and out of the house. Bollinger testified that Mendes cooperated, but because of his hip Mendes was not able to move quickly. Bollinger kept pushing Mendes towards the door, worried that Saylor would return with a weapon. Bollinger "knew it wasn't going to be good," as he thought Saylor might "do

something drastic." Mendes never relinquished the gun or put it away.

Meanwhile, Saylor had gone into the bedroom and then to the laundry room to search for his baseball bat. Mendes had made it across the threshold and was outside the open front door, on the porch, when Saylor came running full speed at him with the baseball bat raised. Mendes shot Saylor point blank, killing him as he neared the doorway. Mendes immediately fled in his car. He drove home and hid the gun in a closet in his house.

The State charged Mendes with first degree premeditated murder (count I), second degree felony murder with a predicate felony of assault (count II), and unlawful possession of a firearm (count III). The jury found Mendes not guilty of premeditated murder. But, the jury found him guilty of the lesser included offense of second degree murder (count I), second degree felony murder (count II),[1] and unlawful possession of a firearm (count III). The jury also found that

[1] RCW 9A.32.050 states:

> (1) A person is guilty of murder in the second degree when:
>
> (a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person; or
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> (b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision (1)(b) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:
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> (i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and
>
> (ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious

Mendes was armed with a firearm during the commission of counts I and II. The court sentenced Mendes based on only the first count of second degree murder but did not vacate the second count. The court imposed a standard range sentence of 457 months. Mendes appeals.

DISCUSSION

I. First Aggressor Instruction

Mendes first contends the trial court erred in giving the jury a first aggressor instruction.[2] A trial court's decision regarding jury instructions is reviewable only for abuse of discretion if based on a factual dispute. State v. Walker, 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998). The trial court's decision based on a ruling of law is reviewed de novo. Id. at 772. To determine whether there is sufficient evidence to support giving an instruction, a court views the evidence in the light most favorable to the party requesting the instruction, in this case, the State. State v. Fernandez-Medina, 141 Wn.2d 448,

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physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the second degree is a class A felony.

[2] The instruction given by the court stated:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense or defense o[f] another and thereupon kill another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

455–56, 6 P.3d 1150 (2000). Jury instructions are sufficient if they permit the parties to argue their theories of the case and properly inform the jury of the applicable law. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

In general, the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation, unless he or she in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action. Id. A court may give an aggressor instruction if there is credible evidence from which a jury could reasonably determine that the defendant provoked the need to act in self-defense. Id. at 909–10. If there is credible evidence that the defendant made the first move by drawing a weapon, the evidence supports giving an aggressor instruction. Id. at 910. The instruction is particularly appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight. Id.; State v. Cyrus, 66 Wn. App. 502, 508–09, 832 P.2d 142 (1992).

But, courts should use care in giving an aggressor instruction. Riley, 137 Wn.2d at 910 n.2. Where supported by the evidence, an aggressor instruction impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. Id. It is prejudicial error to submit an issue to the jury that is not warranted by the evidence. Fernandez-Medina, 141 Wn.2d at 455.

Mendes contends the instruction was improper in this case, because the evidence did not support a finding that he acted as the first aggressor. Since

this is a factual dispute, we review the facts to determine whether the trial court abused its discretion in allowing the instruction. Walker, 136 Wn.2d at 771–72.

The State contends that Mendes conducted a series of acts reasonably "likely to provoke a belligerent response," including spray painting profanity on Palomo's car, visiting Saylor's home when he knew that he was not welcome, and intentionally provoking Saylor by arriving at 11:30 p.m. The trial court agreed. We also agree that these constitute sufficient facts to support giving the first aggressor instruction.

We note that the State also argues on appeal that Mendes was the first aggressor because he was the first to draw a gun. In both Riley, 137 Wn.2d at 906, and State v. Wingate, 155 Wn.2d 817, 823, 122 P.3d 908 (2005), the court found it significant that the defendant was the first person to draw a gun. For example, in Riley, Riley approached the victim, Jaramillo, joking that Jaramillo was a gang member. Riley, 137 Wn.2d at 906. When Jaramillo threatened to shoot Riley, Riley pulled a gun. Id. Riley subsequently shot Jaramillo, explaining that he thought he saw Jaramillo reach for a gun and shot him to keep him from reaching it. Id. at 907. The court held that the first aggressor instruction was appropriate, because Riley was the first to pull out a gun, the first act of violence beyond mere words. Id. at 909. But, the first person to draw a gun is not a first aggressor per se. Other acts could precede it. We reject the broad reading of those cases urged by the State.

Viewing the evidence in the light most favorable to the State, as we must, Fernandez-Medina, 141 Wn.2d at 455–56, we hold that this evidence at

minimum created a factual dispute as to whether Mendes acted as the first aggressor. It was not an abuse of discretion for the trial court to permit the first aggressor instruction.

II. Ineffective Assistance of Counsel

Mendes argues that because the trial court instructed the jury that the first aggressor is not entitled to assert self-defense, he received ineffective assistance of counsel when his counsel failed to request an additional jury instruction explaining that withdrawing from the altercation revives the right to self-defense.

A defendant has a right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and that the deficient performance prejudiced the trial. Id. at 687; State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335–36, 899 P.2d 1251 (1995). To show prejudice, the defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If one of the two prongs of the test is absent, we need not inquire further. Strickland, 466 U.S. at 697; State v.

Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Even after acting as the first aggressor, a person may again claim self-defense if the person withdraws from combat. Riley, 137 Wn.2d at 909. Mendes asserts that no tactical reason could justify not requesting an instruction to the jury explaining the revival of self-defense after withdrawal. We agree. Once counsel lost the argument on giving the first aggressor instruction, there was no longer a tactical reason not to request the revival instruction. The first aggressor instruction trumped the self-defense theory. The defense then needed to request the revival instruction. The jury then could have determined that the defendant did withdraw and had the opportunity to apply the self-defense theory.

The facts supported the revived self-defense instruction. Although Saylor did not have a duty to retreat because he was in his own home, State v. Studd, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999), he had in fact retreated. Saylor had left the room. Mendes testified that he had approximately fifteen seconds to collect his keys and escape. Mendes collected his belongings and started for the door, hampered by his hip injury. He testified that he moved as fast as he could and that Bollinger was assisting him to get out in a hurry. He had crossed the threshold onto the porch when Saylor returned with the bat. Mendes had in fact exited the house and was on the porch when Saylor came running at him with a baseball bat raised to strike.

Also, the facts, if believed by the jury, support Mendes's claim that he acted in self-defense after he withdrew from the conflict: Saylor had already gotten the best of Mendes in hand to hand fighting. Saylor ran full speed at

Mendes with his baseball bat raised. Mendes testified that he feared that Saylor would kill him with the bat. Mendes fired at Saylor at point blank range.

Counsel for Mendes argued to the jury that Mendes was trying to leave when Saylor rushed him with the bat. Counsel used that fact to show that Mendes did not act with premeditation, that he acted in self-defense, and that he was not the first aggressor. Counsel could have argued both theories: The theory of self-defense presumes that the defendant is not the initial aggressor, while the theory of revived self-defense allows an initial aggressor the right of self-defense once he or she has withdrawn from the conflict. State v. Craig, 82 Wn.2d 777, 783, 514 P.2d 151 (1973). Without the instruction Mendes was not able to argue his defense based on both the self-defense and revived self-defense theories.

Counsel was deficient in not putting forth a revived self-defense theory and not requesting an instruction consistent with such a theory. We next address whether the deficiency resulted in prejudice to the defendant. Foster, 140 Wn. App. at 273.

Given the facts detailed above, if the defense had requested a revived self-defense instruction, the trial court's failure to offer the instruction would have been an abuse of discretion. Had the jury been properly instructed, they may have concluded that Mendes had withdrawn and that his right to self-defense had been revived, preventing his convictions. The deficiency of counsel did prejudice the defendant. We hold that the failure to request a revived self-defense instruction denied Mendes effective assistance of counsel as to the

second degree murder conviction. We therefore reverse the second degree murder conviction in count I.

This error also impacts the felony murder conviction. If properly instructed, the jury could have concluded under the revived self-defense instruction that Mendes acted in self-defense. If so, the killing was lawful and he is not guilty of felony murder. RCW 9A.16.050. We reverse the felony murder conviction in count II.

III. Jury Instruction on Self-Defense to the Predicate Assault[3]

Mendes also argues that the trial court erred when it refused to include his proposed instruction regarding self-defense to the predicate assault for the felony murder charge. We agree and hold that this error provides a separate basis to reverse the felony murder conviction.

The felony murder charge alleged that Mendes killed Saylor in the course or in furtherance of committing, or in immediate flight from the commission of, a second degree assault against Saylor. The State argued that the predicate assault occurred when Mendes pointed the gun at Saylor. The trial court instructed the jury on justifiable homicide based on 11 WPIC 16.02, at 234 (2008).[4] Mendes proposed an additional instruction based on WPIC 17.02

[3] We reach this issue because it will be an issue in a new trial on the felony murder charge, and because it is a separate basis to reverse the felony murder charge.

[4] The jury instructions included the following, based on WPIC 16.02 (2008):

> It is a defense to a charge of murder that the homicide was justifiable as defined in this instruction.
>
> Homicide is justifiable when committed in the lawful defense of the slayer when:
>
> (1) the slayer reasonably believed that the person slain

(2008), regarding self-defense to assault.[5] The court refused the instruction. The trial court's ruling of law is reviewed de novo. Walker, 136 Wn.2d at 772.

The trial court relied on the note on use following WPIC 17.02 (2008) for its ruling. The note on use states, "Use this instruction for any charge other than homicide or attempted homicide. If homicide is involved, use WPIC 16.02, Justifiable Homicide—Defense of Self and Others." WPIC 17.02, at 253–54 (2008). Although technically a defense to a homicide charge, because the ultimate charge was felony murder, the requested instruction in fact would have

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intended to inflict death or great personal injury;

(2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and

(3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar circumstances as they appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

[5] The instruction proposed by Mendes stated:

It is a defense to a charge of Assault in the Second Degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

applied to assault, the predicate felony. It should have been given. The note on use is not correct and does not prevent the use of the instruction, on these facts.

On appeal, the State claims that State v. Ferguson, 131 Wn. App. 855, 129 P.3d 856 (2006), precluded the defendant's requested instruction. In Ferguson, the defendant was charged with felony murder for stabbing the victim during a fistfight initiated by the victim. Id. at 856–59. The trial court refused to give a self-defense instruction for the predicate assault. Id. at 859–60. The Court of Appeals affirmed, holding that the trial court properly gave a justifiable homicide instruction rather than a general self-defense instruction. Id. at 862. The court held that 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 17.02, at 196 (2d ed. 1994) (WPIC), "can never be given in a felony murder case where assault is the predicate felony because it can never be reasonable to use a deadly weapon in a deadly manner unless the person attacked had reasonable grounds to fear death or great bodily harm." Id.

In State v. Slaughter, 143 Wn. App. 936, 186 P.3d 1084 (2008), review denied, 164 Wn.2d 1033, 197 P.3d 1184 (2008), the court distinguished Ferguson. In Slaughter, the defendant claimed a defense of excusable homicide against his charge of felony murder. 143 Wn. App. at 938. The trial court gave the excusable homicide instruction, 11 WPIC 15.01, at 169 (1994), instructing the jury that "[h]omicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means." Slaughter, 143 Wn. App. at 942. The court also gave a modified instruction based on WPIC 17.02 (1994) to explain the term "lawful force" as it related to the excusable homicide issue. Slaughter,

143 Wn. App. at 942. This court in Slaughter distinguished Ferguson by explaining that Slaughter could argue that he used reasonable force to prevent injury when the accidental killing occurred. Slaughter, 143 Wn. App. at 946. To the contrary, in Ferguson the defendant used the deadly weapon in a deadly manner, which constituted unreasonable force. Slaughter, 143 Wn. App. at 946. We held it was not an abuse of discretion to offer the modified WPIC 17.02 (1994) instruction in that case. Slaughter, 143 Wn. App. at 945–46.

This case can similarly be distinguished from the facts of Ferguson, where the underlying assault, the stabbing, caused the death. 131 Wn. App. at 856–59. The predicate assault there was the act that caused the victim's death. Id. at 862. Here, the State based the predicate assault on Mendes's brandishing the gun and stating that he could "smoke" Saylor. Ferguson does not control because Mendes did not use the gun in a deadly manner: he did not discharge the gun in that assault.

Here, sufficient facts support the self-defense instruction. Mendes testified that prior to the assault Saylor kicked him from behind without warning. He testified that he had not seen Saylor before the first kick. Brown testified that while Saylor punched Mendes several times, Mendes was flailing, attempting to punch back without success. Mendes said that he spun around and tripped backwards over the coffee table. He then testified that either while falling backwards or while lying on his back, he pulled the gun from inside his coat. He sat up on the coffee table and pointed the gun towards Saylor. He testified that he felt it was necessary to brandish the gun in order to stop Saylor from

continuing to assault him and that he felt like he was in a life or death situation. Given these facts, it was an abuse of discretion for the judge to refuse to instruct the jury on self-defense to the assault. Walker, 136 Wn.2d at 771–72.

If there is an error of law, the party claiming the error must show prejudice. Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995). Had the requested instruction been given, the jury could have reasonably inferred from all the evidence that Mendes had acted in self-defense when he pulled the gun. Fernandez-Medina, 141 Wn.2d at 456–57. If he acted in self-defense, the predicate felony would have failed, and the jury would not have been able to convict on the felony murder charge. Without the requested instruction, Mendes could not adequately argue his theory of the case. On these facts, it was an error of law not to give the requested instruction.

If Mendes was the first aggressor prior to Saylor's attack, then Mendes would not have been entitled to claim self-defense to the assault, and the error would be harmless. We know the jury necessarily rejected Mendes's theory that he acted in self-defense, because it found him guilty. To do so on these facts, the jury must have concluded that Mendes was the first aggressor. The evidence suggests three possible points in time where Mendes could have become the first aggressor: when arriving at the house armed with a weapon, when pulling the gun and threatening to shoot Saylor, and when actually shooting Saylor. The State argued the first two, claiming the "defendant started it" by coming to the house and by drawing the gun.

Based on these facts, neither drawing the gun nor the shooting could

have supported the first aggressor theory. It is undisputed that Saylor initiated the physical altercation by striking Mendes and knocking him over. Mendes brandished the gun in response to Saylor's actions. It is also undisputed that Mendes was on his way out the door when Saylor rushed him with the bat. From the beginning of the fist fight onward, Saylor was the aggressor. The jury could not have properly relied on either incident occurring after that point in time to find that Mendes attained first aggressor status. So, the jury could only have fairly concluded that Mendes's arrival at the house rendered him the first aggressor. Mendes would not have been entitled to claim self-defense after having acted as the first aggressor. The failure to give the self-defense to the assault instruction would have been harmless if arriving at the house established Mendes as the first aggressor. But, the verdict offers no clue on what basis the jury actually decided Mendes was the first aggressor. Therefore we cannot conclude the error was harmless.

The trial court erred by refusing to instruct the jury regarding self-defense to the assault. Because Mendes was prejudiced, and we cannot say the error was harmless beyond a reasonable doubt, this error provides a separate basis upon which to reverse the felony murder conviction.

Because we reverse the convictions, we do not reach Mendes's arguments regarding the sufficiency of the evidence presented by the State to disprove his claim of self-defense nor his claim of double jeopardy. Also, we need not address the arguments raised by Mendes in his statement of additional grounds.

We reverse and remand for further proceedings consistent with this opinion.

WE CONCUR: